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No. ~~97-347~~

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BETTY SPAHN, Guardian of Edna M. Folz,
Petitioner,

v.

MARK WITTMAN, Guardian ad Litem for Edna M. Folz,
and HOWARD B. EISENBERG,
Respondents.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

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PETITIONER'S REPLY BRIEF

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ARGUMENT

The decision of the Wisconsin Supreme Court in Edna Folz's case warrants review by this Court.

The Respondent argues that this Court should deny review for three reasons: (1) this case presents no federal issue; (2) the Constitutional issues raised in the Petition were not presented below; and (3) there is no colorable equal protection issue presented by the decision of the Wisconsin Supreme Court. None of these arguments supports a decision to deny certiorari.

I. THE WISCONSIN SUPREME COURT DECISION AND CONFLICTING HIGH COURT TREATMENT TERMINATION DECISIONS FROM OTHER STATES ARE GROUNDED IN FEDERAL LAW, AND THIS COURT THEREFORE HAS JURISDICTION IN THIS CASE.

The Respondent argues that no federal issue is raised by the Wisconsin Supreme Court's sweeping holding that "as a matter of law, it is not in the best interests of the ward to withdraw life-sustaining treatment, including a feeding tube, unless the ward has executed an advance directive or other statement clearly indicating his or her desires" or by the conflicting law in other states. This argument clearly misconstrues the Wisconsin Supreme Court ruling and the conflicting law discussed in the Petition, and misunderstands the test for United States Supreme Court jurisdiction established by *Michigan v. Long*, 463 U.S. 1032 (1983).

In *Michigan v. Long*, this Court adopted the "plain statement" rule for determining whether it has jurisdiction to review a state court decision: the Court will assume state courts have acted under federal law unless a plain statement to the contrary is made. *Id.* at 1040-41. The state law ground must be spelled out; it must be "clear from the face of the opinion." *Id.* at 1041. A state court decision that does not expressly set out its state grounds or which "appears to rest . . . on grounds *interwoven*

with federal law" provides this Court with jurisdiction. O'Connor, "Our Judicial Federalism," 35 *Case W. Res. L. Rev.* 1, 8 (1984) (*emphasis supplied*). The purpose of this rule is to assure uniformity in the recognition of federal rights among the state courts. *Id.* at 6-8.

The Wisconsin Supreme Court did not at any point in its opinion suggest that its decision was based on state law. To the contrary, throughout its opinion the Wisconsin court repeatedly treated federal and state rights to direct one's medical treatment course as one set of individual rights that it balanced against the state's interest in preserving life. For example, expressly relying on the framework it used in *In the Matter of the Guardianship of L.W.*, 167 Wis. 2d 53, 482 N.W.2d 60 (1992) for its decision in this case, the Wisconsin court reiterated that, " 'an individual's right to refuse unwanted medical treatment emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, Section I of the Wisconsin Constitution.' " Appen. at 6a (*citations omitted*). The Wisconsin court again highlighted the federal law foundation for its analysis by stating that "this court concluded in *L.W.* 'that an incompetent individual in a persistent vegetative state has a constitutionally protected right to refuse unwanted medical treatment, including artificial nutrition and hydration.' " (*citations omitted*). Appen. at 7a.

By its failure to set out separate state grounds, and by its acknowledgment of federal *and* state law bases for treatment decision making rights, the Wisconsin Supreme Court provided this Court with jurisdiction to review its decision. *Michigan*, 463 U.S. at 1040-41. Conspicuously, the Respondent fails to address the *L.W.* analysis relied upon by the Wisconsin court below. Respondent also fails to acknowledge that conflicting state supreme court opinions discussed in the Petition similarly ground treatment decision making rights in both state *and* federal law. Resolution of this conflict of authority among

jurisdictions regarding the protection of incompetent persons' constitutional interests to be free from unwanted treatment warrants review by this Court. *See* U.S. Sup. Ct. R. 10.

II. THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION WERE PRESSED BY PETITIONER IN THE COURTS BELOW.

Petitioner raised the constitutional issues now presented in the Petition for Certiorari before the Wisconsin courts with sufficient clarity to permit this Court to hear the case. Respondent argues that the Wisconsin Supreme Court ignored Petitioner's constitutional arguments in rendering its decision in this case. However, this Court has recognized that the "pressed *or* passed upon" rule is disjunctive, and that the Court is free to consider an issue pressed by the litigants below, even if the state court declined to address the issue. *Illinois v. Gates*, 426 U.S. 218, 216 n.1 (1983).

Petitioner argues in her Petition and repeatedly argued below that this case presents issues of fundamental, personal and constitutional liberty rights. Appen. 53a-55a. Petitioner specifically drew the Wisconsin Supreme Court's attention to the seminal Wisconsin case addressing federal and state constitutionally protected liberties in a medical treatment decision making context. Appen. at 53a (*citing L.W.*, 167 Wis. 2d at 73, 482 N.W.2d at 67 (1992)).

Petitioner's brief to the Wisconsin Court of Appeals, which was allowed to stand as briefing before the Wisconsin Supreme Court, also raised the equal protection issue now advanced on Petition for Certiorari. Petitioner argued that creating a distinction between incompetent individuals in a persistent vegetative state and those not in a persistent vegetative state was "inconsistent with the Supreme Court's earlier conclusion '. . . that the right to refuse all unwanted life-sustaining medical treatment extends to incompetent as well as competent individuals . . .'" Appen. 53a (*quoting L.W.*, 167 Wis. 2d at 73, 482 N.W.2d at 67).

Furthermore, in Petitioner's circuit court brief in Wisconsin, Petitioner raised the equal protection issue and cited the court to the Fourteenth Amendment to the United States Constitution—the same constitutional provision at issue in the Petition for Certiorari:

> 'We find no reason to differentiate between the rights of the competent and incompetent.'
>
> Can it be said then, reasonably or constitutionally, that this right 'extends' from competent individuals only to those incompetent individuals in a persistent vegetative state and somehow excludes all other incompetent individuals? The answer must be 'no.'

Appen. at 51a (*quoting L.W.*, 167 Wis. 2d at 77, 482 N.W.2d at 69).

The issue on certiorari was presented to the courts below. The arguments raised in the Petition constitute nothing more than new arguments in support of Petitioner's original constitutional claim. This Court's rule is that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992) (citations omitted); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). In *Lebron*, the Court reaffirmed the rule in *Yee* that a petitioner is entitled to raise additional arguments in support of its original claims. In *Lebron*, petitioner argued below that Amtrak was subject to constitutional requirements because it was closely connected with federal entities. Petitioner specifically disavowed before the district court and the court of appeals that Amtrak was itself a federal entity. Nonetheless, this Court exercised its discretion to review the issue of whether Amtrak was a federal entity, holding that this issue was simply a new argument in support of petitioner's original claim that Amtrak was subject to constitutional requirements. *Id.*

Similarly, in this case, Respondent concedes that Petitioner raised a federal constitutional challenge to the

Wisconsin Circuit Court's decision before the Wisconsin Supreme Court. Respondent myopically frames the issue raised as whether "the guardian could exercise a patient's constitutional right to refuse treatment." Respondent's Brief in Opposition to Petition for Certiorari at 4. Petitioner's claims below were actually much more expansive than Respondent is willing to acknowledge. Even under Respondent's limited construction of Petitioner's constitutional argument, however, the issues raised in the Petition are simply new arguments in support of her original claim that distinguishing between persistently vegetative and non-persistently vegetative incompetents improperly impacts fundamental rights protected by the United States Constitution.

Finally, this Court has suggested that the "pressed or passed upon below" rule is merely a prudential restriction, rather than a jurisdictional limit on the Court's power of review. *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Vachon v. New Hampshire*, 414 U.S. 478, 479, n.3 (1974).[1] Because this case presents highly significant and time-sensitive issues, this Court should exercise its discretion and accept certiorari.

III. THE WISCONSIN SUPREME COURT DECISION VIOLATES THE EQUAL PROTECTION CLAUSE.

The Respondent also argues that even if raised below, no colorable equal protection issue is presented by the Wisconsin Supreme Court decision. He supports this argument first through the inflammatory statement that the decision in this case is not about liberty interests to refuse unwanted medical treatment but about "causing the death of the disabled person by starvation"—a statement which is reiterated repeatedly throughout his Brief. This characterization of the case at hand is false and proffered

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[1] This Court has declined to definitively state whether the "pressed or passed upon below" rule is prudential or jurisdictional. *Gates*, 462 U.S. at 222.

in an unproductive attempt to avert careful analysis of the important legal issues involved.

This Court has carefully distinguished the removal of life-sustaining treatment from actions which intentionally "cause" death. *See Vacco v. Quill*, —— U.S. ——, 117 S. Ct. 2293, 2298 (1997) ("when a patient refuses life sustaining medical treatment he dies from an underlying fatal disease or pathology") ("when feeding tube is removed, death 'result[s] . . . from [the patient's] underlying medical condition' ") (modifications in original, internal citations omitted). This "distinction comports with fundamental legal principles of causation and intent. . . . [as] the law distinguishes actions taken 'because of' a given end from actions taken 'in spite of' their intended but foreseen consequences." *Id.* 117 S. Ct. at 2298-2299. In addition, as discussed in the *amicus curiae* brief filed by the Wisconsin Health Care Association, Inc. ("WHCA"), the Wisconsin court's holding imposes a blanket prohibition against the withholding or withdrawal of *all* life-sustaining treatment, not just artificial nutrition. *See* WHCA Amicus Br. at 6-8.

The Respondent then goes on to use this Court's recent decisions in *Washington v. Glucksberg*, —— U.S. ——, 117 S. Ct. 2258 (1997) and *Vacco, supra,* to argue that there is no equal protection violation because the Wisconsin court's ruling, which deprives incompetent individuals who never expressed treatment preferences of their right to be free of unwanted medical treatment, need only be rationally related to the state's interest in preserving life. By miscasting the issue in this case—i.e., the right to be free of unwanted medical treatment—as being the same as the issue involved in *Glucksberg* and *Vacco*—i.e., assisted suicide—the Respondent attempts to nullify the fundamental statute of Edna's liberty interests and mischaracterizes the attendant burden which countervailing state interests must meet in order to overcome such interests.

This Court clarified in *Vacco* and *Glucksberg* that the "right" to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause. *Vacco*, 117 S. Ct. at 2297; *Glucksberg*, 117 S. Ct. at 2271. In both holdings, however, the Court clearly differentiated assisted suicide from the right to refuse or withdraw life-sustaining treatment. In *Vacco*, the Court said: "we think the distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions, is both important and logical," *Vacco*, 117 S. Ct. at 2298. In *Glucksberg*, the Court noted its assumption in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), that there is "a constitutionally protected right to refuse lifesaving hydration and nutrition[,]" and then went on to say: "we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide. . . . Indeed the two acts are widely and reasonably regarded as quite distinct." *Glucksberg*, 117 S. Ct. at 2270. *Unlike* assisted suicide, this Court explained, the right to refuse unwanted medical treatment is "so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment." *Glucksberg*, 117 S. Ct. at 2268 n.17, and 2271.[2]

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[2] *See also* Justice Brennan's dissent in *Cruzan*: "[I]f a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and Justice O'Connor concede, it must be fundamental. 'We are dealing here with [a decision] which involves one of the basic civil rights of man.' *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1655 (1942) (invalidating a statute authorizing sterilization of certain felons). Whatever other liberties protected by the Due Process Clause are fundamental, 'those liberties that are deeply rooted in this Nation's history and tradition are among them.' *Bowers v. Harwick*, 478 U.S. 186, 192, 106 S. Ct. 2841, 2844, 92 L. Ed. 140 (1986) (*quoting Moore v. East Cleveland, supra*, 431 U.S. at 503, 97 S. Ct. at 1938 (plurality opinion) . . . The right to be free from medical attention without consent, to determine what shall be done with one's own body *is* deeply rooted in this Nation's

Whenever a fundamental right of a citizen is at stake, classification in state court action that impinges on it is subject to "strict scrutiny," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and can be upheld only if it serves a compelling state interest, *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). *See also Glucksberg*, 117 S. Ct. at 2268 ("the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest' ") (internal citations omitted). The Wisconsin Supreme Court holding fails this test by allowing the withdrawal of life-sustaining treatment from incompetent persons in a persistent vegetative state *absent* the existence of a clear prior treatment directive, but prohibiting such withdrawal for all other incompetent persons *unless* there is a clear prior treatment directive.

In Wisconsin, all seriously ill children and incompetent developmentally disabled adults, as well as the vast majority of previously competent seriously ill adults who have advance directives, must be subjected to any and all available medical interventions regardless of the pain they suffer or the burdens and/or benefits of such treatment. Yet, as noted by the New Jersey Supreme Court, "the State's interest [in preserving life] weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the state interest." *In re Quinlan*, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976), *cert. denied* 429 U.S. 922 (1976). Under current Wisconsin law, however, invasive treatment for most of the incompetent individuals who reach this point must continue foreover.[3]

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traditions, as the majority acknowledges." *Cruzan*, 110 S. Ct. at 2865 (Brennan, J., dissenting).

[3] The Respondent misstates or simply misunderstands the impact of the Wisconsin court's ruling when he admonishes the Petitioner

Finally, the Respondent claims that there is no equal protection violation because non persistently vegetative incompetents *maintain* the right to refuse unwanted medical treatment; they simply have lost the ability to exercise it, and their guardians should be precluded from doing so, on their behalf, because some guardians could have conflicting interests.[4] It is simply preposterous to argue that an individual's "rights" to refuse treatment are maintained in circumstances where exercise of those rights is impossible. As this Court noted: "The law must often adjust the manner in which it affords 'rights' to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain rights to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interest of their principals in mind." *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2693, n.23 (1988) (plurality opinion).

This Court's directive in *Thompson* was previously applied by the 7th Circuit in the context of medical treatment decisions:

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for ignoring the specific facts of this case, including whether Edna is suffering pain, can enjoy life, is chronically or terminally ill, and/or is faithful to the tenets of her religion. The Wisconsin court's decision *precludes* the consideration of any such factors in making life-sustaining treatment decisions for a non-persistently vegetative incompetent who does not have a clear advance directive. The Wisconsin court has determined that regardless of the facts, "as a matter of law, it is not in the best interests of the ward to withdraw life sustaining treatment." Appen. at 9a.

[4] The Respondent recognizes that the Petitioner has no such conflict but argues that a total ban on the exercise of discretion should nonetheless be imposed on guardians in all cases. This approach applies the broadest brush instead of utilizing criteria and safeguards which would provide the most narrowly tailored restriction on incompetents' liberty interests, such as judicial intervention in cases where a conflict may exist.

> [A] patient's incompetency should not deprive him of a liberty interest in 'making' treatment decisions. Such a rule would have the absurd result of granting less protection to those incompetent patients who are in greater need of it. It is of course evident that a patient who is by definition incompetent will not really be able to make these decisions on his own. But this simply means that someone else acting in the patient's best interests will have to make the decision for him.

Lojuk v. Quandt, 706 F.2d 1456, 1466 (7th Cir. 1983), *cert. denied*, 474 U.S. 1067 (1986).

By prohibiting the Petitioner from exercising Edna's liberty interests on her behalf simply because she is not in a persistent vegetative state, the Wisconsin Supreme Court's ruling violates the Fourteenth Amendment.

CONCLUSION

This Court has jurisdiction over this case. This case raises questions of critical national importance. The decision below is wrong and in conflict with decisions of courts in other states. Accordingly, the Petition should be granted.

Respectfully submitted,

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